Shong Mor Sdn Bhd v Cayman Development (Kedah) Sdn Bhd & Ors

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 22–94 OF 2004
ZAMANI A RAHIM JC
21 MAY 2008

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Disputes of fact in existence — Whether case suitable for determination under O 14A of the Rules of the High Court 1980

The plaintiff entered into an agreement ('the agreement') with the first and second defendants to purchase the property in Daerah Kota Seta, Kedah ('the property') at the agreed purchase price of RM201,326. This transaction remained incomplete although the plaintiff had paid RM180,326 towards the purchase price. The plaintiff and its bank had however entered caveats against the property to protect their respective interests. Sometime in August 2002, the plaintiff discovered that the third defendant had trespassed onto the property without the knowledge and consent of the plaintiff and that the latter had proceeded to build twelve units of double-storey terrace houses on the property. The plaintiff thereafter instituted an action against the first and second defendants for having encouraged and allowed the third defendant to trespass onto the property and thereby having committed a breach of the agreement; and against the third defendant for having trespassed onto the property without the consent or approval of the plaintiff. In his action the plaintiff claimed against the three defendants collectively and/or separately for, inter alia, specific performance of the agreement and alternatively damages for breach of contract. In their joint defence the first and second defendants denied the plaintiff's claim, save for the payment of the sum of RM180,326 to the first plaintiff, but admitted that the third defendant had trespassed the property without their approval and knowledge. In its defence the third defendant alleged that it was not a party to the agreement. It also averred that the property had been surrendered to the state authority and that its category of land use had subsequently been changed from industrial to residential with the document of title reissued in the third defendant's name and as such denied having trespassed onto the property. Thereafter, the third defendant made an application under O 14A of the Rules of the High Court 1980 ('the RHC') to summarily dispose of the plaintiff's claim against it without a full trial. In this application the third defendant proposed three questions for the court's determination, to show that that the plaintiff's claim

against it could be summarily dealt with. These three questions required the court to consider whether the plaintiff was claiming specific performance of the agreement it had entered into with the first and second defendants; whether there was any privity of contract between the plaintiff and the third defendant in respect of the agreement; whether the plaintiff was unable to sustain an action against the third defendant in view of the issuance of the individual titles and the transfer of ownership to respective purchasers of the double-storey terrace houses built on the property. The senior assistant registrar disallowed the O 14A application and hence this appeal. In its appeal the third defendant submitted that the property was now the property of the purchasers named in the individual titles to the respective sub-divided portions of the property and that under s 340 of the National Land Code ('the NLC') those purchasers whose names were registered in the title had a better title than the plaintiff. In response the plaintiff relied on s 322(2) of the NLC which prohibits any dealing if there was an enforceable caveat lodge on the property and therefore contended that the registration of the transfer was in breach of the said s 322(2). The sole issue for determination in this appeal was whether the third defendant's application was suitable for determination under O 14A of the RHC.

Held, dismissing the third defendant's appeal with costs:

(1) With regard to the first question, the plaintiff was claiming specific performance of the agreement against the first and second defendants. As to the second question, since the agreement was executed between the plaintiff and the first and second defendants, there was no privity of contract between the plaintiff and the third defendant. Although these two questions were questions of law, they directly concerned the first and second defendants and not the third defendant. Be that as it may the plaintiff's cause of action against the third defendant was not based on the breach of the agreement but on trespass of the property, which the third defendant denied in its statement of defence. There was therefore a dispute on the issue of trespass in the said property and this dispute was certainly a question of fact. It is trite law that if a question of fact is involved, it is inappropriate or unsuitable to have recourse to O 14A of the RHC (see paras 22, 23 & 27).

(2) The third question proposed by the third defendant also involved a question of fact. Apart from a consideration of whether a private caveat on the property prevented any registration of the transfer, there were other factual mysteries in this case which were not ventilated by the third defendant. They involved issues such as how the third defendant had applied for a sub-division of the property without the consent of the plaintiff as one of the caveators of the property; how the third

defendant was able to surrender the document of title of the property, which was in the custody of the plaintiff's bank as security for the loan granted by the bank to the plaintiff; and how the third defendant not being a registered proprietor was able to develop the property into a housing scheme. These unexplained matters pertaining to the property could only be resolved in a full trial. Further, the third defendant's involvement in these issues struck at the core of the plaintiff's claim against it in trespass. In the circumstances, the third defendant ought to be maintained as a party to the plaintiff's claim for otherwise the court would not be able to make any decision affecting it (see paras 30, 40, 41, 42 & 43).

[Bahasa Malaysia summary

Plaintif menandatangani satu perjanjian ('perjanjian') dengan defendan pertama dan kedua untuk membeli harta di Daerah Kota Seta, Kedah ('harta) pada harga belian yang dipersetujui RM201,326. Transaksi ini kekal tidak disempurnakan walaupun plaintif telah membayar RM180,326 terhadap harga belian. Plaintif dan pihak bank bagaimanapun telah memasukkan kaveat terhadap harta tersebut untuk melindungi kepentingan mereka. Dalam bulan Ogos 2002, plaintif mendapati bahawa defendan ketiga telah mencerobohi harta tersebut tanpa persetujuan dan kebenaran plaintif dan kemudiannya mendirikan dua belas unit rumah teres dua tingkat atas harta tersebut. Plaintif kemudiannya memulakan satu tindakan terhadap defendan pertama dan kedua kerana menggalakkan dan membenarkan defendan ketiga mencerobohi harta tersebut dan oleh itu telah melanggar perjanjian; dan terhadap defendan ketiga kerana mencerobohi harta tersebut tanpa persetujuan dan kebenaran plaintif. Dalam tindakannya plaintif menuntut terhadap ketiga-tiga defendan secara kolektif dan/atau secara berasingan untuk, antara lain, pelaksanaan spesifik perjanjian dan secara alternatifnya ganti rugi untuk pelanggaran kontrak. Dalam pembelaan bersama defendan pertama dan kedua menafikan tuntutan plaintif, termasuk pembayaran sejumlah RM180,326 terhadap plaintif pertama, tetapi mengaku bahawa defendan ketiga telah mencerobohi harta tersebut tanpa kebenaran dan pengetahuan mereka. Dalam pembelaannya defendan ketiga mendakwa bahawa dia bukannya pihak kepada perjanjian tersebut. Ia juga menegaskan bahawa harta tersebut telah diserahkan kepada pihak berkuasa negeri dan bahawa kategori penggunaan tanah telah bertukar daripada perindustrian kepada perumahan dengan dokumen hak milik dalam nama defendan ketiga dan oleh itu menafikan bahawa dia telah mencerobohi harta tersebut. Selepas itu, defendan ketiga membuat satu permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menolak tuntutan plaintif secara terus terhadapnya tanpa perbicaraan penuh. Dalam permohonan ini defendan ketiga mengemukakan tiga soalan untuk

ditentukan oleh mahkamah, untuk menunjukkan bahawa tuntutan plaintif terhadapnya boleh dibicarakan secara terus. Ketiga-tiga soalan ini memerlukan mahkamah mempertimbangkan sama ada plaintif menuntut pelaksanaan spesifik perjanjian yang ditandatangani dengan defendan pertama dan kedua; sama ada terdapat priviti kontrak di antara plaintif dan defendan ketiga berkenaan perjanjian tersebut; sama ada plaintif tidak mampu mengekalkan tindakan terhadap defendan ketiga merujuk kepada pengeluaran hak milik inidividu dan pemindahan hak milik untuk pembeli rumah teres dua tingkat yang dibina di atas harta. Penolong kanan pendaftar tidak membenarkan permohonan A 14A dan oleh itu rayuan ini dibuat. Dalam rayuannya defendan ketiga menghujah bahawa harta tersebut kini merupakan harta pembeli yang dinamakan dalam hak milik individu kepada beberapa bahagian harta dan bahawa di bawah s 340 Kanun Tanah Negara ('KTN') pembeli yang namanya didaftarkan dalam hak milik mempunyai hak milik yang lebih baik berbanding plaintif. Sebagai balasan plaintif bergantung kepada s 322(2) KTN yang melarang sebarang urusniaga sekiranya terdapat kaveat yang dikuatkuasakan ke atas harta dan oleh itu mendakwa bahawa pendaftaran pemindahan telah melanggar s 322(2). Isu utama yang perlu ditentukan dalam rayuan ini ialah sama ada permohonan defendan ketiga sesuai untuk ditentukan di bawah A 14A KMT.

Diputuskan, menolak rayuan defendan ketiga dengan kos:

(1) Berkenaan soalan pertama, plaintif menuntut pelaksanaan spesifik terhadap defendan pertama dan kedua. Berkenaan soalan kedua, memandangkan perjanjian telah dimeterai di antara plaintif dan defendan pertama dan kedua, tiada priviti kontrak di antara plaintif dan defendan ketiga. Walaupun kedua-dua soalan ini merupakan persoalan undang-undang, secara langsung ia berkenaan defendan pertama dan kedua dan bukannya defendan ketiga. Meskipun kausa tindakan plaintif terhadap defendan ketiga tidak berdasarkan pelanggaran perjanjian tetapi atas pencerobohan harta, defendan ketiga telah membuat penafian dalam pernyataan pembelaan. Oleh itu terdapat pertikaian mengenai isu pencerobohan harta tersebut dan pertikaian ini sememangnya merupakan persoalan fakta. Ia merupakan undang-undang yang lapuk bahawa sekiranya persoalan fakta terlibat, maka adalah tidak sesuai untuk menggunakan A 14A KMT (lihat perenggan 22, 23 & 27).

(2) Soalan ketiga yang dikemukakan oleh defendan ketiga juga melibatkan persoalan fakta. Selain daripada mempertimbangkan sama ada kaveat persendirian di atas harta menghalang sebarang pendaftaran pemindahan, terdapat beberapa fakta yang misteri dalam kes ini yang tidak disuarakan oleh defendan ketiga. Ia melibatkan isu-isu seperti

bagaimana defendan ketiga telah menggunakan pecahan lot harta tanpa persetujuan plaintif sebagai seorang daripada pengkaveat-pengkaveat harta; bagaimana defendan ketiga boleh menyerahkan dokumen hak milik harta, yang berada dalam jagaan bank plaintif sebagai jaminan untuk pinjaman yang diberikan oleh bank kepada plaintif; dan bagaimana defendan ketiga yang bukannya tuan punya berdaftar boleh membangunkan harta kepada rancangan perumahan. Perkara-perkara yang tidak dijelaskan ini hanya boleh diselesaikan dalam perbicaraan penuh. Selanjutnya lagi, penglibatan defendan ketiga dalam isu-isu ini menyentuh isu utama tuntutan plaintif terhadapnya dalam pencerobohan. Dalam keadaan ini, defendan ketiga sepatutnya dikekalkan sebagai pihak kepada tuntutan plaintif sekiranya tidak mahkamah tidak dapat membuat sebarang keputusan mengenainya (lihat perenggan 30, 40, 41, 42 & 43).]

Notes

For cases on disposal of case on point of law, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2537–2546.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2008] 1 AMR 105, CA (folld)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 211, PC (refd)

Ismail bin Mohamad v Haji Yahya & 8 Ors [1988] 2 MLJ 185, HC (refd)

Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320, FC (refd)

Mohamed v Alaga & Co (a firm) [1998] 2 All ER 720, Ch D (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)

Woon Kim Poh v Sa'amah bt Hj Kasim [1987] 1 MLJ 400, SC (refd)

Legislation referred to

National Land Code ss 195, 196, 322(2), 340
Rules of the High Court 1980 O 14A

Duratul Akmal bt Abdul Aziz (Gan Teik Chee & Ho) for the plaintiff.
Victor Paul (Abdul Halim Said & Co) for the first and second defendants.
Daphne Choy (Thong Weng Cheong with her) (Syarikat Lim Kiam Hoon) for the third defendant.

Zamani A Rahim JC:

INTRODUCTION

[1] Enclosure 40A is an appeal by the third defendant ('D3') who is

dissatisfied with the decision of senior assistant registrar dated 10 May 2006 which disallowed encl 25 which was filed by D3.

[2] Enclosure 25 is an application by D3 pursuant to O 14A of the Rules of the High Court 1980 ('RHC') for the court's determination of the proposed three questions without going through a full trial of the action. The three proposed questions are:

(a) whether the plaintiff in the writ of summons dated 14 June 2004 and the statement of claim dated 12 June 2004 is claiming specific performance of the agreement dated 2 March 1996 entered into between the plaintiff of the one part and the first and second defendants of the second and third parts in respect of the property formerly known as Lot Perindustrian (Plot 707) No HS (D) 179/95, No Lot PT 9255, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah (hereinafter referred to as 'the said property'). For brevity, this question will hereinafter referred to as 'question 1';

(b) whether there is no privity of contract between the plaintiff and the third defendant in respect of the said agreement of 2 March 1996. For brevity, this question will hereinafter referred to as 'question 2'; and

(c) whether the plaintiff is unable to sustain any action against the third defendant in view of the transfer of ownership to the purchasers of and the issuance of the individual titles to the units of residential houses in the project known as Taman Desa Seraya erected on a portion of the said property. For brevity, this question will hereinafter referred to as 'question 3'.

FACTUAL BACKGROUND

[3] The brief facts leading to this appeal, may be gathered from the plaintiff's statement of claim, the first defendant (D1) and second defendant's (D2) joint statement of defence and the third defendant's (D3) statement of defence.

Summary of plaintiff's claim

[4] By an agreement dated 2 March 1996 between the plaintiff as the purchaser of one part, D1 as the vendor of the other part and D2 as the proprietor of another part, the plaintiff agreed to purchase the property which was formerly known as Lot Perindustrian (Plot 707), No HS (D) 179/95, No Lot PT 9255, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah ('the said property'). A copy of the said agreement dated 2 March 1996 is annexed to the affidavit of Tan Chee Guan affirmed on 25 March 2005 (encl 26) as exh marked 'TCG 1'.

[5] Notwithstanding that the plaintiff had paid a sum of RM180,326 out of a total purchase consideration of RM201,326 to D1, the transaction was not completed (see paras 12–19 of the statement of claim).

[6] The plaintiff and the plaintiff's bank, Southern Finance Bhd had each entered caveats against the said property on 10 August 1998 and 10 February 1998 respectively to protect their respective interest.

[7] Sometime in August 2002, the plaintiff came to know that there were twelve units of double-storey terrace house built or erected on the said property (see para 20 of the statement of claim).

[8] Upon enquiry, the plaintiff discovered that the said property had been trespassed by D3 without the knowledge and consent of the plaintiff despite the subsistence of the said agreement dated 2 March 1996 which was still valid, binding and enforceable (see para 21 of the statement of claim).

[9] D1 and D2 had breached the said agreement in that, D1 and D2 had directly or indirectly encouraged and allowed D3 to trespass the said property without the consent and/or approval of the plaintiff (see para 27 of the statement of claim).

[10] As a result of the trespass by D3, the plaintiff has suffered loss and/or delay and/or failure, neglect, refusal by D1 and D2 in the performance of the said agreement and/or the transfer of the said property to the plaintiff (see para 31 of the statement of claim).

[11] The plaintiff claims against D1, D2 and D3 collectively and/for separately for, inter alia, a specific performance of the said agreement dated 2 March 1996 and alternatively, damages for breach of contract.

Summary of D1 and D2's defence

[12] D1 and D2 allege in their defence dated 21 October 2004, save for the payment of the sum of RM180,326 to D1, the plaintiff's claim is denied (see para 5 of D1 and D2's defence).

[13] D1 and D2 have been aware of the construction of houses on the said property since March 2003 upon being notified by the plaintiff. D1 in turn informed of the same to D3 and requested, inter alia, to be informed of the actual status of the said property from D3 but to no avail (see para 12 of D1 and D2's defence).

[14] D1 and D2 admitted that D3 had trespassed the said property without their approval and knowledge (see para 13 of D1 and D2's defence).

Summary of D3's defence

[15] D3 alleges in its defence dated 3 August 2004 and filed herein that it was not a party to the said agreement dated 2 March 1996 (see para 6 of D3's defence).

[16] The said property had been surrendered to the state authority and subsequently had its category of land use changed from industrial to residential with the document of title reissued in D3's name (see para 7 of D3's defence).

[17] The process of re-issuance of the document of title and the change of its category of land use of the said property was done with the express approval of the Kedah State Exco, the Land Administration of Kota Setar and the Director of Lands and Minerals, Kedah (see para 8 of D3's defence).

[18] D3 denied having trespassed the said property.

[19] As stated at the outset of this judgment, this application was made by D3 under O 14A of the RHC 1980 with a view to summarily disposed of the action without a full trial. Order 14A reads as follows:

(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The court shall not determine any question under this order unless the parties have had an opportunity on being heard on the question.

(4) The jurisdiction of the court under this order may be exercised by a registrar.

(5) Nothing in this order shall limit the powers of the court under Order 18 rule 19 or any other provision of these rules.

[20] Order 14A was introduced in our RHC 1980 with the objective of speedy disposal of civil cases filed in court without the necessity to call for oral evidence. Our High Court may upon application of a party to determine any question of law or construction of document arising in any cause or matter where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein: see the judgment of Mohd Noor Ahmad JCA (later FCJ) in the Court of Appeal of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8.

[21] In this application, D3 did not state or specify whether the proposed three questions are questions of law or construction of document. However, looking at the pleadings, presumably D3 intended the court to make a determination on a mixed question of law and fact.

[22] Indeed, question one and question two are questions of law but both questions directly concern D1 and D2 and not D3. As regard to question one, the plaintiff is claiming specific performance of the said agreement dated 2 March 1996 against D1 and D2. The said agreement dated 2 March 1996 was executed between the plaintiff on one part, D1 and D2 on the other part. D3 was not privy to the said agreement. In other words, there was no privity of contract between the plaintiff and D3.

[23] Be that as it may, the cause of action filed by the plaintiff against D3 was not based on the breach of the agreement dated 2 March 1996, but on trespass of the said property by D3. In his statement of claim, the plaintiff pleaded, inter alia:

(i) D1 and D2 had breached the said agreement in that, D1 and D2 had directly or indirectly encouraged and allowed D3 to trespass the said property without the consent and/or approval of the plaintiff (see para 27 of the statement of claim); and

(ii) as a result of the trespass by D3, the plaintiff has suffered loss (see para 31 of the statement of claim).

[24] On the issue of trespass, D1 and D2 are supportive of the plaintiff's claim against D3 by pleading, inter alia:

(i) D1 and D2 have been aware of the construction of houses on the said property since March 2003 open being notified by the plaintiff; D1 in turn informed of the same to D3 and requested, inter alia, to be

informed of the actual status of the said property from D3 but to no avail (see para 12 of D1 and D2 defence); and

(ii) D1 and D2 admitted that D3 had trespassed the said property without their approval and knowledge (see para 13 of D1 and D2 defence).

[25] Pursuant to these averments on trespass, D3 had denied. In his defence, D3 pleaded:

(i) D3 denied having trespassed the said property.

[26] There is, therefore, a dispute on the issue of trespass in the said property. This dispute was certainly a question of fact. If question of fact is involved, it is inappropriate or unsuitable to have recourse to O 14A. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2008] 1 AMR 105, Zainun Ali JCA (the majority decision) had cited the English case of *Mohamed v Alaga & Co (a firm)* [1998] 2 All ER 720 where Lightman J succinctly said the following words:

> ... Under O 14A, the court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. *Order 14A is accordingly not apt for determining a question which involves a question of fact.*

[27] Zulkefli Ahmad Makinudin JCA (dissenting) in *Dream Property Sdn Bhd* at p 827 (MLJ); p 113 (AMR) had this to say:

> It is trite law, for the court to exercise its power to summarily dispose of an action under O 14A of the RHC 1980, *there should not be any dispute by the parties as to the relevant facts*, or that the court, upon scrutinising the pleadings, concludes that the material facts are not in dispute: see the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*.

[28] His Lordship went on to say at p 827 (MLJ); p 114 (AMR) as follows:

> ... the entrenched principle of law tahat the court will not exercise its jurisdiction under O 14A of the RHC 1980 on the basis of facts which are strenously disputed, ...

[29] As the above stated principle is a well established principle, it matters not that it is made in the course of a dissenting judgment. It is applicable with equal force. It is consistent with the statement made by Lightman J in *Mohamed v Alaga & Co* which was relied upon by Zainun Ali JCA, the majority decision in *Dream Property Sdn Bhd*.

[30] Now we come to question three which is also involved a question fact. The fact as to whether the plaintiff is unable to maintain any action against D3 is by no means plain and simple. The fact is strenously disputed. However, D3 argued that as the answers to question one and question two are undisputed and affirmative, it would only be logical for the answer to question three to be in the affirmative as well in that the plaintiff would have no cause of action against D3 for specific performance or damages. This is in view of the issuance of the individual titles and the transfer of ownership to respective purchasers of the double storey terrace houses built on the said property known as Taman Desa Seraya D3 had relied on the principle in *Ismail bin Mohamad v Mayah & 2 Ors* [1988] 2 MLJ 185, the assistant collector had allowed the registration of the transfers from the land owners to the new purchasers notwithstanding a subsisting and valid caveat by the plaintiff who had paid valuable consideration for the same property prior to the transaction with the new purchasers LC Vohrah J held as follows:

> I am of the view, having regard to the fact that the nine defendants purchased the said interest 'in good faith and for valuable consideration' and in complete ignorance of Ismail's agreement with the three ladies, that they have a better claim than Ismail because they have actually paid the full purchase price, obtained registration of the said interest in their respective names expeditiously and gone into possession of the land ...

[31] Applying *Ismail Mohamad* principle, D3 argued that the said property shall remain the property of the purchasers or owners named in the individual titles to the respective sub-divided portions of the said property.

[32] And further D3 grounded his submission on the indefeasibility of title under s 340 of the NLC. The purchasers of the residential houses whose names were registered in the title, have a better claim than the plaintiff because they were purchasers in good faith and for valuable consideration. Their titles were indefeasible. The plaintiff too could not bring himself within the exception of indefeasibility of title to the said s 340.

[33] In the circumstances, D3 submitted that there is not necessity to set the matter down for trial in so far as it concerns D3 as the question of law and fact set out above can be determined without the full trial of the action.

[34] In response, the plaintiff relied on the provision of s 322(2) of the NLC which prohibits any dealing if there is enforceable caveat lodged on the alienated land. The plaintiff went on to cite the Supreme Court case of *Wong Kim Poh v Sa'amah bt Hj Kasim* [1987] 1 MLJ 400, the respondent had entered into a joint venture agreement with the developer to develop a piece land into a housing project. The land owned by the respondent. Pursuant to

the agreement, the said land was registered in the name of the developer. One of the term of the agreement was that a certain amount of money had to be paid within a stipulated period and the developer was to apply for conversion and sub-division of the said land within a stipulated time. However, the developer had failed to perform its obligation under the agreement, the respondent had made application that the said land be transferred back to him. The respondent also had lodged a caveat on the said land and the caveat was later extended.

[35] Whilst the caveat was still subsisting, the developer had transferred the said land to the appellant. The transfer was duly registered.

[36] Thereafter the respondent made an application that the aforesaid transfer was null and void or be declared as null and void.

[37] The question arose was: whether the registrar of land was allowed under the law to register the aforesaid transfer despite the subsistence of an enforceable caveat.

[38] Hashim Yeop A Sani FCJ held at p 400 as follows:

> (2) in the Torrens System where registration is the very basis of the system the prohibition in s 322(2) of the National Land Code, which prohibits registration, endorsement or entry on the register document of title of any instrument of dealing so long as caveat is in force, must be strictly complied with. The registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.
>
> (3) the appellant cannot claim the protection of s 340 of the National Land Code by the default of the Registrar to observe the statutory prohibition of s 322(2) of the Code.
>
> ... The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 211. A caveat freezes the register as least until the caveator has taken court action to determine his claim, Judith Sihombing at p 588. In the Torrens system where registration is the very basis of the system the prohibition in s 322(2) must be strictly complied with. In other words the registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

[39] Based on the decision in *Woon Kim Poh* the plaintiff contended that D3 could not use the provision of s 340 to support its argument to thwart

A the plaintiff's claim to the said property. This was because a valid and enforceable caveat was in existence on the said property. Hence, the registration of the transfer was in breach of s 322(2) of the NLC.

B **[40]** Apart from the opposing submission above, there are other factual mysteries which are completely silent and not ventilated by D3. These facts are essential to be discussed so that they can be unravelled in the course of the full trial. They are:

C **[41]** In making the application for sub-division of the said property, D3 had failed to obtain the consent from the plaintiff as one of the caveators of the said property. How on earth D3 was able to surrender the document of title of the said property because at all material time the said titles were in the custody of the plaintiff bank as security for loan granted by the plaintiff bank
D to D2.

[42] Further, by developing the said property into a housing scheme had clearly violated s 195 and s 196 of the NLC. Section 195 states that only the
E registered proprietor of the alienated land is empowered to surrender the whole or part thereof to the state authority. In the instant case, the registered proprietor of the said property was D2 and not D3. Whilst s 196 states that before any alienated land is surrendered to the state authority, all those housing interest therein, for example the plaintiff and the plaintiff bank in
F their capacity as caveators in this case, are required to give their written consent. But no such consents were ever given by both the plaintiff and his bank.

G **[43]** It is obvious that the surrender of the said property by D3 to the state authority is not in compliance with s 195 and s 196 of the NLC. This issue is required to be thrashed out in the full trial to resolve the unexplained matters pertaining to the said property. In this regard, D3 cannot be said to be uninvolved. Instead D3's involvement strikes at the core of the plaintiff
H claim against D3 on trespass. I have no doubt that there is a cause of action by the plaintiff against D3. It is important that D3 should be maintained as a party in this action and not severed off. If D3 is not made a party to the plaintiff claim, the court is unable to make any decision affecting it. In the Federal Court case of *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ
I 320, Sean FJ said at p 323 as follows:

> In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions ...

[44] In the upshot, D3 application herein is not suitable for determination under O 14A of the RHC 1980.

[45] The decision of the senior assistant registrar dated 15 February 2006 in dismissing D3's application under O 14A is upheld. I too, hereby order that D3's application vide encl 40A is dismissed with costs.

Third defendant's appeal dismissed with costs.

Reported by Kanesh Sundram